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Nos. 02-1238, 02-1386 and 02-1405

IN THE

Supreme Court of the United States

JEREMIAH W. NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF SPRINT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:

JOHN G. SHORT
KENNETH SCHIFMAN
SPRINT CORPORATION
6450 Sprint Parkway
Overland Park, KS 66251
(913) 315-9232

DAVID P. MURRAY
Counsel of Record
RANDY BRANITSKY
WILLKIE FARR & GALLAGHER
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

Counsel for Sprint Corporation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether 47 U.S.C. § 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," preserves or preempts the States' sovereign authority to prohibit their political subdivisions from offering telecommunications services to the public.

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BRIEF OF SPRINT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

Sprint Corporation ("Sprint") respectfully submits this brief as *amicus curiae*, pursuant to Rule 37.2(a) of the Rules of this Court.[1]

INTEREST OF SPRINT CORPORATION AS *AMICUS CURIAE*

Sprint has substantial local, long distance, and wireless telephony operations throughout the United States. Several

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[1] Sprint's brief is submitted on written consents of the parties, which were filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part, and no persons other than Sprint made a monetary contribution to the preparation of this brief. Sup. Ct. R. 37.6.

Sprint subsidiaries are incumbent local exchange carriers serving approximately eight million local access lines in predominantly rural communities of eighteen states, including more than 250,000 local access lines in Missouri. Other Sprint subsidiaries offer nationwide wireless and long distance services, and provide competitive local exchange service in more than thirty states.

Sprint's customer, employee, and shareholder constituencies are vitally interested in this case. The D.C. Circuit and the Eighth Circuit have split over the proper construction of Section 253(a) of the Telecommunications Act of 1996 (the "1996 Act"), issuing diametrically opposed rulings on the power of States to prohibit their political subdivisions from entering local telecommunications markets. Other federal and state courts have issued similarly conflicting rulings. This split of authority undermines rational implementation of the 1996 Act and is creating confusion in state capitals across the country. Without effective state control, market entry by political subdivisions into this complex, volatile industry creates significant risks to taxpayers, who are forced to subsidize the ventures, harms the employees and shareholders of private sector companies that have invested in these local communities, and undermines fair and effective competition. The Eighth Circuit's expansive reading of the preemptive scope of Section 253(a) seriously threatens Sprint's investments and interests in Missouri and other states.

SUMMARY OF ARGUMENT

The question presented by the petitions implicates important competition and public policy issues that transcend the interests of the parties and directly affect consumers and private industry nationwide. Municipalities and other state political subdivisions historically are less efficient than private sector companies in providing competitive telecommunications services, yet they enjoy numerous financial,

regulatory, and other advantages that are difficult if not impossible to quantify or regulate. For example, a municipality can subsidize its operations with taxes and other public revenues, can issue tax-free debt, has superior access to public rights-of-way, and is not subject to the same profit expectations or accounting standards as a private company. Entry into competitive local telecommunications markets by government providers, therefore, involves a host of complex questions, including the extent to which taxpayers (including private competitors) may be forced to subsidize a government entrant's provision of such services, the types of signals and incentives that will be given to private industry regarding market entry and investments in infrastructure and new technologies, and the long-term interests of consumers.

Many states have chosen to prohibit their political subdivisions from providing local telephone service and have focused instead on more traditional and tailored governmental actions to promote competition, such as tax incentives and regulatory reform. States that have permitted their political subdivisions into the market, on the other hand, have become embroiled in extensive efforts to implement and enforce "level playing field" laws, which attempt to limit the ability of government entrants to use tax subsidies and other advantages to obstruct the competitive forces in an open market. These laws have resulted in increased state regulation of intrastate telecommunications services, have proven difficult to enforce, and have consumed scarce state resources. Serious questions remain whether such regulatory attempts to replicate competitive local market conditions will ever be successful.

The Eighth Circuit has interpreted Section 253(a) of the 1996 Act to preempt the sovereign authority of the States over their political subdivisions in this vital area. The opinion allows individual municipalities and other state instrumentalities to enter into local telecommunications

markets even if a state has made the public policy choice not to permit government competition with private enterprise. The D.C. Circuit and the FCC, in contrast, have determined that Section 253(a) does not preempt the States' authority to prohibit their political subdivisions from providing local telecommunications services. These decisions are better reasoned and promote the pro-competitive goals of the 1996 Act by preserving state control over government entry into such markets.

This Court should grant the petitions and resolve the split of authority between the Eighth Circuit and the D.C. Circuit. A definitive ruling by this Court is necessary for rational implementation of the 1996 Act, will remove the uncertainties created by these and other conflicting judicial decisions for state and local governments and private sector companies, and will protect the interests of consumers by promoting fair and effective competition for their local telecommunications services.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONS PRESENT IMPORTANT ISSUES THAT AFFECT THE INTERESTS OF CONSUMERS AND PRIVATE INDUSTRY MEMBERS NATIONWIDE.

a. Government entry into intrastate telecommunications businesses raises significant competition and public policy questions. If unchecked, market entry by a municipality or other state instrumentality undermines competition for telecommunications services, deters private entrants, and defeats the very purposes of the 1996 Act. The petitions ask whether Section 253(a) is properly interpreted to preserve or preempt state authority in this vital area, based on the statutory language and the pro-competitive objectives of Congress.

The correct answer to that question is critically important to consumers and private sector companies throughout the country.

b. The 1996 Act is designed to promote competition in our nation's communications markets through "accelerate[d] . . . *private* sector deployment of advanced telecommunications and information technologies and services." S. Conf. Rep. No. 104-230, at 113 (1996) (emphasis added). Congress envisioned that, over time, such competition would reduce or possibly eliminate the need for government regulation. *See Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 638 (2002); Federal Communications Commission, *Strategic Plan for the 21st Century*, at 1 (Aug. 1999). Sprint and other private companies have heeded this call, investing hundreds of millions of dollars to develop and expand their wireline and wireless networks in local communities across the country. These investments have created jobs and contributed significantly to the local economies.

Since 1996, an increasing number of municipalities and other state political subdivisions have entered the market for communications services, including local phone, cable, and Internet services. *See* Jeffrey A. Eisenach, *Does Government Belong in the Telecom Business?*, at 6-11 & Table 2, *at* http://www.pff.org/POP8.1GovtTelecom011001LOGO.pdf (Jan. 2001) ("*Telecom Business*"). In juxtaposition to this emerging trend, experience shows that these government forays into communications businesses distort the marketplace and undermine fair and effective competition.

Municipalities and other political subdivisions are able to cross-subsidize their telecommunications offerings in numerous ways. Revenues generated through local taxes and fees can be—and are—used to help fund these "competitive"

ventures.[2] Municipalities can also issue tax-free debt to support their operations.[3] In addition to these direct public subsidies, municipalities enjoy other significant advantages over private competitors. A municipality typically has preferential access to essential public rights-of-way, is exempt from local franchise fees and taxes, and is not subject to the same profit expectations or accounting standards as its private counterparts. *See Telecom Business* at 15.

The public subsidies and other advantages enjoyed by government entrants enable them to undercut private competitors in the provision of local telecommunications services. *See* Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly against Private Providers,* 95 Nw. U. L. Rev. 1099 (2001).[4] Yet, residential and business subscribers do not benefit from

[2] The City of Lebanon, Ohio, for example, charges developers of new houses a "Broadband Connection Fee" of $1,250 to subsidize its deployment of a fiber optic network, regardless of whether the homeowner ever subscribes to the City's broadband services. *See Home Builders Ass'n. of Dayton & Miami Valley v. City of Lebanon, Ohio*, Case No. 02CV59491 (Common Pleas Ct., Warren County, Ohio). Sprint and other private competitors have no ability to raise capital through such "fees" in deploying their networks.

[3] For instance, the City of Bristol, Virginia recently announced a $48 million bond offering, at least $11 million of which is earmarked for its local cable and telecommunications system. *See* Mike Still, *Bristol Virginia City Council Gives Blessing to $48.2 Million Bond Issue Plan, at* http://www.bristolnews.com/servlet/Satellite?pagename=BHC%2FMGArticle%2FBHC_BasicArticle&c=MGArticle&cid=1031768984728&path=!news (Mar. 26, 2003).

[4] *See also* David E.M. Sappington & J. Gregory Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises* (Working Paper 99-11), at 1-2 (AEI-Brookings Institute Joint Center for Regulatory Studies Nov. 1999) (generally finding that public enterprises "have stronger incentives than profit-maximizing firms to pursue activities that disadvantage competitors").

the "lower" rates offered by a government entity, since they have already subsidized the costs of providing the services through their local taxes. *See* Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network,* at 3 (Progress & Freedom Foundation), *at* www.pff.org/publications/pop9.7guppyclick.pdf (Feb. 2002) ("*Government Entry*"). Private carriers like Sprint, who have spent millions of dollars in building their local networks, are similarly forced to subsidize these "competitive" government operations through the payment of property taxes on their facilities, as well as various franchise fees, pole attachment fees, and rights-of-way fees. The advantages accorded to government providers also deter the entry of private sector companies that may have legitimate competitive advantages, such as technological advances or greater efficiencies, but cannot compete with the publicly-funded government provider. This is particularly problematic in telecommunications, where attaining sufficient scale is key to any competitor's survival. The inequities created by government entry into local telephone markets likewise reduce the incentives for Sprint and other private carriers to invest in new infrastructure and technologies. This impedes the deployment of advanced telecommunications and information services by the private sector, thus undermining one of the primary objectives of the 1996 Act. *See* 47 U.S.C. § 157(a). The unique advantages enjoyed by government providers, therefore, create an "uneven playing field" and ultimately deny consumers the full benefits of competition.

c. At the same time, economists generally agree that government entrants are less efficient than private industry in delivering these types of services. *See, e.g.*, Joseph Stiglitz, *Whither Socialism* 237 (MIT Press 1994); James Q. Wilson, *Bureaucracy* 227 (Basic Books 1989); *Telecom Business* at 12. Whereas a private company must act efficiently to turn a profit or risk closure, a municipality can use public subsidies to continue operating at significant losses. *See Government*

Entry at 4. Government entrants thus lack the normal market incentives to make effective business decisions and are particularly ill-suited to manage competitive operations that involve the kind of advanced technologies and rapid innovations found in the telecommunications industry. *Telecom Business* at 12. Ultimately, taxpayers are forced to bear the risks of these ventures rather than private investors.[5]

Experience to date shows that government-run telecommunications businesses have failed to provide the promised public benefits and economic efficiencies. *See, e.g.*, Ronald J. Rizzuto & Michael O. Wirth, *Costs, Benefits, and Long-Term Sustainability of Municipal Cable Television Over builds* (GSA Press 1998); *Government Entry* at 5-10; *Telecom Business* at 12-14. Most of these public systems have operated at significant losses, subsidized by local taxpayers, while failing to keep pace with new and cheaper technologies for providing the services. *See Government Entry* at 9-10. In a truly competitive environment, operating at a loss and failing to keep pace with technological advances would drive the inefficient competitor out of the marketplace. But in the case of the government provider, the natural market dynamics are distorted because of the cross-subsidies and other inherent advantages it enjoys.

d. In recognition of the adverse effects on competition and consumers that can result from government entry, many states

[5] The recent turmoil in the telecommunications industry underscores these potential risks. Over the past two years, there have been over eighty bankruptcy filings by private sector telecommunications companies and a market capitalization loss of over two trillion dollars. Yuki Noguchi, *Firm Offers One-Stop Telecom Shopping*, Wash. Post, May 13, 2003; Bob Fernandez, *Telecom Industry Devastated by the Boom that Never Was*, Phila. Inquirer, June 30, 2002. Given the inherently risky nature of the industry, states would be wholly justified in making a public policy decision to keep their political subdivisions from entering into this marketplace.

have enacted laws which restrict or prohibit their political subdivisions from providing local telecommunications services.[6] These laws enable a state to allocate its resources to more traditional means of promoting the deployment of advanced telecommunications services within its borders, such as removing regulatory barriers, helping to develop local infrastructures, and providing other incentives for private entrants to invest in local communities. *Telecom Business* at 16-17 (citing examples). Mississippi, for example, recently enacted a law that provides income and franchise tax credits for investments in broadband equipment. S. 2979, 2003 Reg. Sess. (Miss. Apr. 19, 2003). Such tailored governmental actions provide incentives for private competitors to invest in new telecommunications technology and to deploy their networks in rural communities. And instead of competing against private enterprise, this type of governmental approach stimulates effective competition while reducing the need for state regulation of the services.

States that have permitted market entry by their political subdivisions, on the other hand, have been compelled to enact "level playing field" laws and regulations designed to deter anti-competitive behavior and to protect consumers.[7] Development of these laws requires extensive efforts by state and

[6] *See, e.g.*, Mo. Ann. Stat. § 392.410.7 (West Supp. 2003); Tex. Util. Code §§ 54.001, 54.201 - .202 (Vernon 2002); Ala. Code §§ 11-50B-1 *et seq.* (Supp. 2002); Ark. Code Ann. § 23-17-409 (Michie Supp. 2002); Neb. Rev. Stat. Ann. §§ 86-128(1)(b), 86-575(2) (Michie Supp. 2002); Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001); Tenn. Code Ann. § 7-52-601 *et seq.* (Supp. 2001).

[7] *See, e.g.*, Fla. Stat. Ann. §§ 125.421, 166.047, 196.012(6), 199.183 (1)(b), 212.086(6) (2000 & Supp. 2003); Iowa Code Ann. § 388.10 (West 2002); Minn. Stat. Ann. § 237.19 (West 2002); S.C. Code Ann. § 58-9-2620 (2002); Utah Code Ann. §§ 10-8-14, 10-18-101 - 106, 10-18-201 - 204, 10-18-301 - 306 (2003); Va. Code Ann. §§ 15.2-1500, 56-265.4:4 (Michie Supp. 2002).

local legislative and regulatory officials, as well as private industry. Administration and enforcement of these laws has also proven to be difficult.

In Virginia, for instance, Sprint has been participating in costly, months-long regulatory proceedings in which the City of Bristol, doing business as the Bristol Virginia Utilities Board ("BVUB"), must demonstrate that it has complied with the Commonwealth's "level playing field" requirements. *See* Va. Code Ann. §§ 15.2-2160, 56-265.4:4 (Michie Supp. 2002). The proceedings involve a review of complicated cost studies and other information by the Virginia State Corporation Commission and interested private parties, to ensure that BVUB is not subsidizing its telecommunications services with public funds or revenues and is complying with other "level playing field" requirements. *See* Order, Case No. PUC-2002-00231 (Va. State Corp. Comm'n Dec. 19, 2002). In addition to the specific proceedings involving BVUB, the Virginia State Corporation Commission recently issued administrative rules to implement the Commonwealth's level playing field mandates. The new rules require, among other things, that municipal entrants submit data, on an annual basis, demonstrating that they are not offering telecommunications services below the incremental cost of providing them, and maintain separate books and records for their telecommunications businesses. *See* Order Adopting Rules, Case No. PUC-2002-00115 (Va. State Corp. Comm'n Apr. 9, 2003), 20 VAC 5-417-40. Administration and enforcement of these new rules by the Virginia State Corporation Commission will require extensive state resources each year.

Even with comprehensive "level playing field" laws and regular state administrative oversight, it is virtually impossible to account for all of the potential hidden subsidies and advantages that a municipality or other public entity may enjoy in "competing" for local telecommunications services. *See Telecom Business* at 15 (because most of these subsidies

and other advantages are "hidden from view and difficult or impossible to quantify, the one thing public utilities never do is provide an accurate gauge of the true costs of providing any service"). A prime example of such an advantage is that, unlike Sprint and other private sector incumbents, BVUB has no "carrier of last resort" duties, which obligate a carrier to serve any customers within a specified territory who request local telecommunications services.[8] BVUB can thus choose to serve only the more profitable government, business, and high volume residential customers, leaving to Sprint the burden of providing services to high cost, low volume (often rural) customers. Exempting government providers from the "carrier of last resort" obligations imposed on private sector companies plainly distorts the marketplace and deters private entry.

Given the many inherent advantages enjoyed by government entrants, it is highly unlikely that state regulatory attempts to replicate a "level playing field" will ever result in efficient competition. The only certainty is that government entry requires *increased* state regulation of local telecommunications services, rather than reduced state regulation as envisioned by Congress.

e. The ability of States to control market entry by their local subdivisions, therefore, is critically important to the viability and growth of competition for intrastate telecommunications services. Apart from the fundamental question of state sovereignty raised by the petitions, which has been fully addressed by Petitioners, the important competition and public policy issues implicated by the circuit conflict further warrant review of the case by this Court.

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[8] *See* Letter from BVUB Counsel to Virginia State Corporation Commission of July 8, 2002 (amending BVUB's Application for Certificate in Case No. PUC-2002-00126); Order Granting Certificate, Case No. PUC-2002-00126 (Va. State Corp. Comm'n Nov. 26, 2002).

II. THE QUESTION OF LAW PRESENTED BY THE PETITIONS HAS RESULTED IN CONFLICTING DECISIONS IN AN INCREASING NUMBER OF FEDERAL AND STATE COURTS AND IS RIPE FOR REVIEW.

a. The petitions present a square conflict between the Eighth Circuit and the D.C. Circuit over the proper meaning of a key provision of the 1996 Act. The Eighth Circuit has held that Section 253(a) of the 1996 Act, 47 U.S.C. § 253(a), preempts state laws that prohibit municipalities and other political subdivisions from providing intrastate telecommunications services. (FCC Pet. App. at 6a, 7a). The court found that the words "any entity" in the statute encompass municipalities and evince an unambiguous intent by Congress to preempt state authority in this area, thus satisfying the "plain statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). (FCC Pet. App. at 7a). Accordingly, the court struck a Missouri statute that precluded market entry by municipalities.

The Eighth Circuit's decision effectively mandates that States allow the entry of individual municipalities and other state instrumentalities into intrastate telecommunications markets. The States, in turn, are powerless to prohibit municipal competition with private enterprise even when state or local policies and circumstances demonstrate that other governmental approaches would better promote fair and effective competition and the deployment of advanced technologies and services. The Eighth Circuit's decision also opens the door for municipalities and other local subdivisions to resist, under the guise of "federal preemption," legitimate efforts by the States to impose "level playing field" conditions on market entry to prevent anti-competitive conduct and to protect consumer interests. Local government entrants can be expected to argue that such state legislative curbs are "barriers to entry" that have the effect of prohibiting their

ability to compete with private companies, thus running afoul of Section 253(a)'s mandates. These disputes will undoubtedly generate additional litigation and will increase the costs and burdens to States and private competitors resulting from the decision.

The D.C. Circuit and the FCC, in contrast, have held that Section 253(a) does not preempt the authority of States to prohibit their political subdivisions from providing telecommunications services. Both the court and the agency found that the words "any entity" in Section 253(a) appear to prohibit restrictions on market entry by independent entities subject to state regulation, and do not evince a plain and unmistakable intent by Congress to intrude on the sovereign power of a state to control market entry by its own political units. Accordingly, the D.C. Circuit and the FCC upheld a Texas statute which generally prohibits municipalities from providing telecommunications services. *City of Abilene, Tex. v. FCC*, 164 F.3d 49, 52-54 (D.C. Cir. 1999).

These decisions are better reasoned and adhere more faithfully to the "plain statement" rule of *Gregory v. Ashcroft*. The term "entity" can mean different things depending upon the context, *see Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (finding use of term "entity" ambiguous in 47 U.S.C. § 224), and this Court recently found that use of a modifier like "any" in a statute is insufficient evidence of congressional intent to interfere with the sovereign relationship between a state and its political subdivisions, *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 542-46 (2002) (interpreting terms "any claim" in determining whether tolling provisions of 28 U.S.C. § 1367(d) applied to state claim dismissed on Eleventh Amendment grounds). By preserving state authority over government entry into local telecommunications markets, the decisions of the D.C. Circuit and the FCC also enable States to promote, rather than undermine, the pro-competitive goals of the 1996 Act.

b. The question presented by the petitions will continue to arise. As shown, other states have enacted similar laws prohibiting or restricting their instrumentalities from entering local telecommunications markets. More states are likely to introduce and enact such legislation in the future, given the crucial competition and public policy issues at stake. *See, e.g.*, S. 321 & H.R. 298, 2003-2004 Reg. Sess. (Pa. 2003) (pending before Pa. General Assembly).

c. Continued consideration of the preemptive scope of Section 253(a) by other courts will not lead to a definitive, coherent view of the law on the question presented. Indeed, the Iowa and Nebraska Supreme Courts have already split along the same lines as the D.C. Circuit and the Eighth Circuit. The Supreme Court of Iowa held that Section 253(a) does not preempt state authority over market entry by municipalities, *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999), while the Supreme Court of Nebraska held that the statute preempts such authority, *In re Lincoln Elec. Sys.*, 655 N.W.2d 363 (Neb. 2003).[9] Other federal and state courts have also reached conflicting rulings on the same question. *See City of Bristol, Va. v. Earley*, 145 F. Supp. 2d 741, 746-50 (W.D. Va. 2001) (adopting Eighth Circuit position), *vacated*, No. 01-1741 (4th Cir. May 1, 2002) (district court opinion and order vacated, and appeals dismissed as moot by May 1, 2002 Order); *Municipal Elec.*

[9] The Nebraska Telecommunications Association and the Nebraska Cable Communications Association jointly filed a petition for writ of certiorari with this Court to review the Nebraska Supreme Court decision and have requested consolidation with this case. *In re Lincoln Elec. Sys.*, 655 N.W.2d 363 (Neb.), *petition for cert. filed*, (U.S. Apr. 30, 2003) (No. 02-1591). A Sprint subsidiary provides local exchange service to approximately 28,000 access lines in Nebraska. Sprint supports grant of the associations' petition in the Nebraska case for the same reasons set forth above.

Auth. v. Georgia Pub. Serv. Comm'n, 525 S.E.2d 399 (Ga. Ct. App. 1999) (adopting D.C. Circuit position), *cert. denied*, No. S00C0601 (Ga. May 1, 2000).

d. The question presented by the petitions, therefore, is ripe for review by this Court. The growing split of authority over the proper meaning and effect of Section 253(a) has created significant uncertainties in the telecommunications industry and, if allowed to stand, will seriously undermine implementation of the 1996 Act and impede the development of effective competition in the local telecommunications market. Resolution of this important question will provide much needed guidance to the FCC, the States and their instrumentalities, and private sector companies like Sprint. It will also ensure that the pro-competitive purposes of Congress are achieved, thereby advancing the interests of consumers and private sector companies around the nation in fair and effective competition for intrastate telecommunications services.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

JOHN G. SHORT
KENNETH SCHIFMAN
SPRINT CORPORATION
6450 Sprint Parkway
Overland Park, KS 66251
(913) 315-9232

DAVID P. MURRAY
Counsel of Record
RANDY BRANITSKY
WILLKIE FARR & GALLAGHER
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

Counsel for Sprint Corporation